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HAROLD B. WILL

Supreme Court of the United States

OCTOBER TERM, 1954

No. 762

LYLES & LANG CONSTRUCTION COMPANY,
PETITIONER,

versus

E. I. DuPONT DE NEMOURS & COMPANY AND UNITED STATES OF AMERICA, RESPONDENTS.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Lyles & Lang Construction Company prays that in the event this Court should grant the petition by E. I. duPont de Nemours & Company and United States of America for a writ of certiorari in No. to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on February 2, 1955, that a writ of certiorari do also issue to review the decision of the Court of Appeals that the duPont Company had the right to terminate its contract with Lyles & Lang at any time and to allow Lyles & Lang its profit and overhead factor only on its expended costs rather than on the whole of the costs of the construction provided for in the contract.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court of May 7, 1954 is unreported. It is printed (R. 1-37) in the appendix record in the Court of Appeals to be filed by duPont and the United States in No. . That portion of the opinion allowing Lyles & Lang damages for breach of the contract because of duPont's premature cancellation, in addition to its compensation under the contract, is printed for convenience in the appendix to this cross-petition. The opinion of the Court of Appeals is reported in 219 F. (2d) 328. It is printed in full in the appendix to the petition in No. and the portions pertinent to the questions raised in this cross-petition are printed in the appendix hereto.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1254 (1). The judgment of the Court of Appeals was entered on February 2, 1955.

QUESTIONS PRESENTED

1. Did the contract between duPont and Lyles & Lang give duPont the right to terminate prior to the acceptance of occupancy of the dormitories?

2. If such right to terminate existed, did duPont give the requisite notice of termination?

STATEMENT

This action was brought in the District Court for the Eastern District of South Carolina by Lyles & Lang against the duPont Company alone, jurisdiction of the District Court being invoked because of diversity of citizenship of the parties. After a full trial of the cause on the merits, the District Court entered judgment in favor of the plaintiff in the amount of $854,614.50. Of this amount approximately $110,000.00 was found to be due as damages for the breach

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of the contract in duPont's cancellation of those dormitories which were to be constructed at a site near Beech Island, S. C. but the construction of which had not been completed at the time of termination. The remainder of the judgment was for the recovery of the plaintiff's out-of-pocket expenses on the construction and operation which had been accomplished at all of the dormitory sites plus 20% of such expenses for profit and overhead. The contract (R. 565) specifically called for that measure of recovery in the event of duPont's termination for convenience during the first twelve months of operations in lieu of all other compensation to the plaintiff; which would have been, if the contract had gone on to completion, a guaranteed rental of $8.25 per man per week for 7,500 rental units for two or, at the option of duPont, three years.

The Court of Appeals affirmed that portion of the judgment based upon the plaintiff's recovery of its actual costs and its profit and overhead factor on the costs incurred before the termination of the Beech Island dormitories but reversed the District Court's additional allowance to the plaintiff of the profit percentage which it would have received on the construction work which it was not permitted to complete at Beech Island. The effect of this holding, in our view, is to deny to Lyles & Lang the minimum compensation which it had bargained for, *i. e.*, 20% on the whole of the construction cost of the dormitories.

The District Court, in addition to its holding that the contract did not contemplate termination by duPont prior to the construction of the dormitories, found that the formal termination notice required by the contract was not given in respect to the Beech Island dormitories. Section 3(b) of the Contract (R. 564) required thirty days' written notice of any termination for convenience. On February 7, 1952, duPont sent a letter to the plaintiff advising it to stop its

activities at Beech Island "temporarily" (Ex. 18, R. 584). This letter did not purport to be a termination notice. On March 5, 1952, a proper termination notice was sent (Ex. 20, R. 585), but the effective date of that notice was March 7, 1952. Thus a two days' notice rather than a thirty days' notice was given. The Court of Appeals held, however, that the letter of February 7, 1952, served the purpose of a termination notice and that the plaintiff was not damaged by the lack of notice.

REASONS FOR GRANTING THE WRIT

We submit that if the Court determines to grant the petition for certiorari being filed by duPont and the United States in No. , it should review the entire case and reinstate the judgment of the District Court, for we feel that the decision of the Court of Appeals was erroneous on several grounds:

(1) The contract provided for compensation to Lyles & Lang if termination for convenience took place (a) in the period between "date of occupancy" and twelve months thereafter, and (b) in the period beyond the twelve months anniversary. In the first period the cost-plus formula applied; in the second, a lump sum table. There was not in the contract any provision for compensation to the contractor on a termination **prior** to the date of occupancy. Since the parties cannot be thought to have provided for a termination without compensation to the contractor, the contract does not provide for termination prior to the "date of occupancy" of any dormitory.

(2) The broad introductory language of Section 3(b) of the contract (R. 564) that "this agreement or any part thereof may be terminated by duPont subject to the approval of the Commission for the convenience of the Commission" is limited by the remainder of the Section providing for the methods of compensating the contractor and

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must be construed in the light of the true intent of the parties as ascertained from the whole instrument. *Alderman v. Alderman,* 178 S. C. 9, 181 S. E. 897; 6 *Corbin on Contracts,* 46, Sec. 1206.

(3) The parties in negotiating the contract contemplated that Lyles & Lang would build dormitories to house 7,500 men and that, in any event, it would be entitled to its 20% profit and overhead factor on the whole cost of the full construction (R. 305-7, 319). All of the contractor's estimates, of costs and of possible profits, were made on the basis of 7,500 units. Lyles & Lang was not low bidder except upon the basis of all 7,500 units. (R. 380.) Lyles & Lang took its risk upon that basis and is entitled to its profit upon that basis.

(4) At least two documents prepared by duPont (the letter of August 28, 1951, awarding the contract to Lyles & Lang, Ex. 11, R. 580; and Supplement 2 to the Contract, Ex. 3, R. 575) refer to the type of termination at issue here —the earliest termination permitted by the contract—as "termination during the first twelve months of operation."

(5) The case of *Reconstruction Finance Corp. v. Sherwood Distilling Co.,* 4 Cir., 200 F. (2d) 672, which the Court of Appeals refers to as "directly in point" was distinctly different from the present case. The contract language was different. There was no limitation upon the broad right to terminate. The right to terminate was in either party, not in one, as here. There were equitable factors in the *Sherwood case* which the Court felt made the contractor's position unreasonable and unjust. The opposite should be true here.

(6) The Court of Appeals considered the question in terms of whether Lyles & Lang should be permitted to build dormitories that were not needed. The dormitories would not be built in any event and the only question is whether Lyles & Lang is entitled to the profits which it lost because of the termination.

(7) Even if duPont had the right to terminate, the contractor was entitled to a strict compliance with the notice requirements of the contract. 3 *Black Rescission and Cancellation of Contracts,* 1409, Sec. 572. If the contract notice was not given, the termination was not under the contract and was a common law termination which entitled Lyles & Lang to its common law damages.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that in the event the Court should grant the petition of duPont and the United States for a writ of certiorari in No. , this petition for a writ of certiorari should likewise be granted.

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April, 1955.

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APPENDIX

From the Opinion of the District Court of May 7, 1954

(R. 30-4)

* * *

The second cause of action presents for decision the question of whether the contract between the parties reserved to dul'ont the right to cancel the Beech Island portion of the contract for the convenience of the Atomic Energy Commission **prior to the construction of the dormitories there** and thus to bring into play the formula under which the plaintiff's recovery would be limited, as in the first cause of action, by the plaintiff's expenditures plus 20% for profit and overhead, or whether the contract failed to reserve such a right. If the latter is the true construction, the plaintiff's recovery would be measured by its expenditures plus its losses of expected profits on this phase of the contract. *Feaster v. Richland Cotton Mills*, 51 S. C. 153, 28 S. E. 301.

The defendant contends that the first sentence of Section 3(b) gives it the right to terminate at any time. The language relied upon is as follows: "This agreement or any part thereof may be terminated by dul'ont subject to the approval of the Commission, for the convenience of the Commission". Standing alone that sentence might be construed as embodying full agreement by the parties that any portion or all of the contract might be terminated by the defendant at any time, before or after construction; but such a construction is not obligatory. It must be borne in mind that a unilateral right in one party to cancel a contract against the wishes of the other party should not be given effect unless it is clearly intended. In the light of these considerations, I feel that we must go beyond the first sentence of Section 3(b) and weigh the intention manifested in the subsequent portions of that section.

The portion of the section which provides for compensation to the contractor in the event of termination for convenience is as follows: "In the event of termination of the Agreement on one or more of said dormitory buildings **prior to twelve months following the date of occupancy** of such building or buildings, dul'ont shall pay the Operator a sum equal to the actual costs, etc. * * *." The plain-

tiff argues that you cannot terminate a building or buildings before a building exists and that termination cannot be "following the date of occupancy" if it precedes that date. The more one studies the paragraph providing for compensation to the contractor, the clearer it becomes that termination was not contemplated except during two periods: (1) the period between the "date of occupancy" and twelve months thereafter, and (2) the period beyond twelve months after the date of occupancy. In the first period the cost plus formula applied as to the first cause of action applies; in the second period the table of lump sum compensation applies. There is no provision for compensation to the contractor on a termination prior to the date of occupancy at any site.

The defendant's briefs do not dispute this interpretation of the compensation provisions of the termination for convenience paragraph. They rely solely upon the first sentence of the section and say in effect that the plaintiff's claim rests upon a confusion of the **right** to terminate with the right to **compensation** upon termination. I cannot believe that the parties intended that there should be a right to terminate in one of them without a corresponding right to compensation in the other. I am therefore of the opinion, and so hold, that the defendant had no right to terminate the Beech Island site prior to the "date of occupancy" at that site.

My opinion is reinforced by the certainty that the parties were not contemplating, when they executed the contract, that all of the buildings might not be constructed. I have already referred to duPont's expressions to the plaintiff of confidence that many more than the 7,500 units would be needed. DuPont's invitation to bid was certainly on the basis of 7,500 units and the plaintiff's estimates of costs and profits were on that basis.

Supplement No. 2 to the contract (P's. Ex. 3) also establishes that the parties did not contemplate termination before the "date of occupancy" at any site. That Supplement, in referring to the same type of termination referred to in Section 3(b) of the original contract, calls

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it "termination for convenience **during the first twelve months of operation**".

I conclude that the defendant in its purported Beech Island termination also failed to observe the contract in respect to the notice given. On February 7, 1952, defendant advised the plaintiff (P's. Ex. 18) to stop its activities at Beech Island temporarily. This letter did not purport to be the formal termination notice required by the contract. On March 5, 1952, proper termination notice was given but the effective date of that notice was March 7, 1952—only two days notice against the contract's requirement of thirty days. Since the notice was not in conformity with the contract, the cancellation was not under the contract and was a common law cancellation.

The measure of the plaintiff's damages, under the rule announced in *Feaster v. Richland Cotton Mills, supra*, 51 S. C. 143, 28 S. E. 301, is the difference between what it would have received upon full performance and what full performance would have cost it. In the present situation that difference is 20% of the total cost of the dormitories at Beech Island.

* * *

It will be noted that by cancelling the Beech Island dormitories when it did, duPont effected a saving of over $545,000.00 in construction moneys. Although, as I have held, the cancellation was not authorized by the contract and the defendant is obligated to the plaintiff for the profit which was bargained for, the cancellation was prompted by good business judgment and is commendable from the viewpoint of economy.

From the Opinion of the Court of Appeals

(219 F. (2d) 340)

* * *

The learned trial judge was of opinion that termination of the contract as to any building was not authorized under the contract until the building had been completed and accepted for occupancy. In this we think there was error. Under the language heretofore quoted there could be termination of the contract for the convenience of the

Commission, and there was no limitation upon the right to terminate except the requirement of 30 days' written notice. A lump sum guarantee was provided for termination after 12 months occupancy and a cost plus basis of compensation was provided "in the event of termination * * * prior to twelve months following the date of occupancy", but nowhere was there any provision requiring that a building be completed and accepted for occupancy before the right to terminate would arise and we think it unreasonable to place any such interpretation upon the contract. The right of termination was inserted to protect against the burdensome guarantee in the event it should develop that the buildings were not needed; and if this appeared before construction or acceptance there was every reason why the cost of construction should be avoided or minimized by terminating the plaintiff's obligation to construct. No useful purpose could be served by requiring the construction of a building which was not needed—by requiring plaintiff to incur additional costs of construction in order that defendant might be required to pay additional amounts under its guaranty. A case directly in point, we think, is the recent decision of this court in *Reconstruction Finance Corp. v. Sherwood Distilling Co.*, 4 Cir., 200 F. (2d) 672, 675, where the court, speaking through Judge Dobie, said:

> "The District Judge also stressed the clauses in the contract giving Sherwood the right of purchase and then stated 'We believe that when these provisions are read in relation to the entire agreement, they contemplate the giving of the options only upon the plant as a completed structure.' With this interpretation of the termination clause of the contract, even when read in the light of the entire contract, we cannot agree. This termination clause is absolute and unconditional on its face. We find nothing in the other clauses of the contract which would justify us in **adding** to the termination a **new** limitation that the right to terminate (by either party) could be exercised **only after the completion of the project**. To say (as apparently the District Judge says) that immediately before the com-

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arty could terminate;
project's completion,
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E. I. DUPONT & CO., *et al.*, RESPONDENTS—A

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but that, immediately after the project
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and unreasonable interpretation of the

We think it just as unreasonable to say
though defendant could terminate the contr
building immediately upon its completion a
it could not exercise the right to terminate be
but would have to allow the construction
which it knew that it would not use.

And we do not think that the notice of te
void on the ground that 30 days' notice as r
contract was not given. On February 7, 1952
duly notified to suspend operations at the Bee
On March 5 a letter of termination was sen
the contract as of March 7. The letter of Febr
all the purposes of a letter of termination, in
tiff notice not to incur further expense at Be
however, it was not sufficient, the only effect
ficiency was to extend to April 4 the effective
nation, and there is no evidence of any dam
venience resulting from the delay. The plain
to recover with respect to Beech Island on t
as for termination at other sites, *i. e.*, costs
20% thereon for overhead and profits less the
and salvage of materials. As no buildings w
and accepted for occupancy at the site there
course, no deduction on account of rents.

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